EXHIBIT A
HAWAIʻI RULES OF PROFESSIONAL CONDUCT

Adopted and Promulgated by the Supreme Court of the State of Hawaiʻi

December 6, 1993
Effective January 1, 1994
With Amendments as Noted

The Judiciary
State of Hawaiʻi

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Adopted December 6, 1993;
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PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

[3] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except insofar as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[4] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[5] As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[6] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[7] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[8] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to

clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

[9] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[10] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[11] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing the observance of the rules by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[12] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[1] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may" or "should" are permissive and define areas under the rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should." Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

[2] The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

[3] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[4] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. *See, e.g., State v. Klattenhoff*, 71 Haw. 598, 801 P.2d 548 (1990); *Sapienza v. Heen*, 57 Haw. 284, 554 P.2d 1128 (1976); *Island-Gentry Joint Venture v. State*, 57 Haw. 259, 554 P.2d 761 (1976). For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. *See, e.g., Island-Gentry Joint Venture v. State*, 57 Haw. 259, 264-65, 554 P.2d 761, 765 (1976) (recognizing Attorney General's "exclusive [statutory] authority to control and manage for the State all phases of civil litigation in which the State has an interest"). Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.

[5] Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[6] Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

[7] Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege except insofar as those rules provide otherwise. Those privileges were developed to promote compliance with law and faimess in litigation. In

reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

[8] The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

[9] The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The Preamble and this note on Scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative.

TERMINOLOGY

[1] "Belief " or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

[2] "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

[3] "Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

[4] "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

[5] "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

[6] "Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

[7] "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

[8] "Reasonable belief " or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

[9] "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

[10] "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

[11] "Qualified legal assistance organization" means a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, is not in violation of any applicable law.

(*Amended effective November 18, 1994.*)

HAWAI'I RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

Rule 1.1. COMPETENCE.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

COMMENT:

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate, or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Hawai'i Code Comparison

DR 6-101(A)(1) provided that a lawyer shall not handle a matter "which he [or she] knows or should know that he [or she] is not competent to handle, without associating himself [or herself] with a lawyer who is

competent to handle it." DR 6-101(A)(2) required "preparation adequate in the circumstances." Rule 1.1 more fully particularizes the elements of competence. Whereas DR 6-101(A)(3) prohibited the "[N]eglect of a legal matter," Rule 1.1 does not contain such a prohibition. Instead, Rule 1.1 affirmatively requires the lawyer to be competent.

Rule 1.2. SCOPE OF REPRESENTATION.

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which the objectives are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

COMMENT:

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

[2] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[3] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Services Limited in Objectives or Means

[4] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[5] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue. This rule does not affect a lawyer's right to withdraw under Rule 1.16.

Criminal, Fraudulent and Prohibited Transactions

[6] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[7] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6 or Rule 4.1. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

[8] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[9] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Hawai'i Code Comparison

Paragraph (a) has no counterpart in the Disciplinary Rules of the Hawai'i Code. EC 7-7 stated: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his [or her] own. But otherwise the authority to make decisions is exclusively that of the client. . . ." EC 7-8 stated that "[i]n the final analysis, however, the . . . decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client. . . . In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not

prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." DR 7-101(A)(1) provided that a lawyer "shall not intentionally . . . fail to seek the lawful objectives of his [or her] client through reasonably available means permitted by law. . . . A lawyer does not violate this Disciplinary Rule, however, by . . . avoiding offensive tactics. . . ."

Paragraph (b) has no counterpart in the Hawai'i Code.

With regard to paragraph (c), DR 7-101(B)(1) provided that a lawyer may, "where permissible, exercise his [or her] professional judgment to waive or fail to assert a right or position of his [or her] client."

With regard to paragraph (d), DR 7-102(A)(7) provided that a lawyer shall not "counsel or assist [the lawyer's] client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(6) provided that a lawyer shall not "participate in the creation or preservation of evidence when [the lawyer] knows or it is obvious that the evidence is false." DR 7-106 provided that a lawyer shall not "advise his [or her] client to disregard a standing rule of a tribunal or a ruling of a tribunal . . . but [the lawyer] may take appropriate steps in good faith to test the validity of such rule or ruling." EC 7-5 stated that a lawyer "should never encourage or aid [the lawyer's] client to commit criminal acts or counsel [the lawyer's] client on how to violate the law and avoid punishment therefor."

With regard to paragraph (e), DR 2-110(C)(1)(c) provided that a lawyer may withdraw from representation if a client "insists" that the lawyer engage in "conduct that is illegal or that is prohibited under the Disciplinary Rules." DR 9-101(C) provided that "a lawyer shall not state or imply that he is able to influence improperly . . . any tribunal, legislative body or public official."

Rule 1.3. DILIGENCE.

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

[2] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[3] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative

proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Hawai'i Code Comparison

DR 6-101(A) (3) required that a lawyer not "[n]eglect a legal matter entrusted to him [or her]. EC 6-4 stated that a lawyer should "give appropriate attention to his [or her] legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law." DR 7-101(A) (1) provided that a lawyer "shall not intentionally . . . fail to seek the lawful objectives of [the lawyer's] client through reasonably available means permitted by law and the Disciplinary Rules. . . ." DR 7-101(A) (3) provided that a lawyer "shall not intentionally . . . [p]rejudice or damage his [or her] client during the course of the professional relationship. . . ."

Rule 1.4. COMMUNICATION.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. A lawyer who receives a written offer of settlement in a civil controversy or a proffered plea bargain in a criminal case shall promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT:

[1] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which the objectives are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives an oral offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

[2] Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[3] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the

organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

[4] Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(e) directs compliance with such rules or orders.

Hawai'i Code Comparison

Rule 1.4 has no direct counterpart in the Disciplinary Rules of the Hawai'i Code. DR 6-101(A) (3) provided that a lawyer shall not "[n]eglect a legal matter entrusted to [the lawyer]." DR 9-102(B) (1) provided that a lawyer shall "[p]romptly notify a client of the receipt of his [or her] funds, securities, or other properties." EC 7-8 stated that a lawyer "should exert his [or her] best efforts to insure that decisions of [the lawyer's] client are made only after the client has been informed of relevant considerations." EC 9-2 stated that "a lawyer should fully and promptly inform [the lawyer's] client of material developments in the matters being handled for the client."

(Amended effective November 18, 1994.)

Rule 1.5. FEES.

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent, and in contingency fee cases the risk of no recovery and the conscionability of the fee in light of the net recovery to the client;

(9) the relative sophistication of the lawyer and the client; and

(10) the informed consent of the client to the fee agreement.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee, payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer and, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

(f) This rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

COMMENT:

Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, the lawyer and the client ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

[2] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[3] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as Haw. Rev. Stat. § 607-15.5.

[4] Contingency fee agreements may be proper in proceedings to enforce or satisfy a judgment for property distribution or past due alimony or child support.

Division of Fee

[5] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring

lawyer and a trial specialist. Paragraph (e) does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes over Fees

[6] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Hawaiʻi Code Comparison

DR 2-106(A) provided that a lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." DR 2-106(B) provided that a fee is "clearly excessive when after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." EC 2-17 stated that a lawyer "should not charge more than a reasonable fee. . . ."

There was no counterpart to paragraph (b) in the Disciplinary Rules of the Hawaiʻi Code. EC 2-19 stated that it is "usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent."

There was also no counterpart to paragraph (c) in the Disciplinary Rules of the Hawaiʻi Code. EC 2-20 provided that "[c]ontingent fee arrangements in civil cases have long been commonly accepted in the United States," but that "a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee. . . ."

With regard to paragraph (d), DR 2-106(C) prohibited "a contingent fee in a criminal case." EC 2-20 provided that "contingent fee arrangements in domestic relation cases are rarely justified."

With regard to paragraph (e), DR 2-107(A) permitted division of fees only if: "(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed and responsibility assumed by each. (3) The total fee does not exceed clearly reasonable compensation. . . . "

Rule 1.6. CONFIDENTIALITY OF INFORMATION.

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal information which clearly establishes a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used, to the extent reasonably necessary to rectify the consequences of such act, where the act has resulted in substantial injury to the financial interests or property of another.

(c) A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's act which the lawyer reasonably believes to have been criminal or fraudulent and in the furtherance of which the lawyer's services had been used;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good;

(5) to rectify the consequences of a public official's or a public agency's act which the government lawyer reasonably believes to have been criminal or illegal and harmful to the public good; or

(6) to comply with other law or court order.

COMMENT:

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the

client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

[7] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[9] The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may realize that the client has used or intends to use the lawyer's services in the furtherance of criminal or fraudulent conduct. Several situations are addressed by other rules. The lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

[10] The lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Nevertheless, to extend the protection of Rule 1.6 to information possessed by the lawyer with respect to such conduct would have the effect of assisting the client in such conduct in violation of the policy expressed in Rule 1.2(d).

[11] Where the lawyer's information clearly establishes a criminal or fraudulent act by the client, the mandatory disclosure requirement of Rule 1.6(b) may be applicable. Where the lawyer's information falls short of clearly establishing the criminal or fraudulent act, but supports a reasonable belief by the lawyer that a criminal or fraudulent act has occurred, the discretionary disclosure provisions of Rule 1.6(c)(2) may be applicable. The requirement that the lawyer's services must have been used by the client in the furtherance of the criminal or fraudulent act means that the services must have been a substantial element in enabling the client to accomplish the criminal or fraudulent enterprise. The extent of the disclosure will necessarily vary according to the circumstances. The term "rectify" is taken from former DR 7-102(B)(1).

[12] The lawyer may learn that a client intends prospective conduct that is criminal or fraudulent and likely to result in death, substantial bodily harm, or substantial injury to the financial interests or property of another. As stated in Rule 1.6(c)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent such consequences which the lawyer reasonably believes are intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

[13] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. If such action is taken, the need for disclosure abates. A lawyer's decision not to take preventive action permitted by paragraphs (c)(1) or (c)(2) does not violate this rule.

Withdrawal

[14] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[15] After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[16] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning Lawyer's Conduct

[17] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[18] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (c)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[19] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. Under Rule 1.6(c)(6) the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[20] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules, but Rule 1.6(c)(4) permits the lawyer to make a disclosure to comply with other law.

Former Client

[21] The duty of confidentiality continues after the client-lawyer relationship has terminated.

Hawaiʻi Code Comparison

Rule 1.6 eliminates the two-pronged duty under the Hawaiʻi Code in favor of a single standard protecting all information about a client "relating to representation." Under DR 4-101, the requirement applied only to information protected by the attorney-client privilege and to information "gained in" the professional relationship that "the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." EC 4-4 added that the duty differed from the evidentiary privilege in that it existed "without regard to the nature or source of information or the fact that others share the knowledge." Rule 1.6 imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental.

Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer was not permitted to reveal "confidences" unless the client first consented after disclosure.

DR 7-102(B)(1) required a lawyer to reveal fraud perpetrated by the client upon a person or tribunal in the course of the representation. Paragraph (b) of Rule 1.6 redefines this obligation so as to apply to criminal and fraudulent acts furthered by use of the lawyer's services which result in substantial injury to financial interests or property, and so to extend so far as reasonably necessary to rectify the consequences.

Paragraph (c) redefines the discretionary exceptions to the requirement of confidentiality. DR 4-101(C)(3) provided that, without regard to the seriousness of the crime, a lawyer "may reveal [t]he intention of [the lawyer's] client to commit a crime and the information necessary to prevent the crime." Paragraph (c)(1) confines discretionary disclosure of prospective client crime or fraud to acts believed likely to result in substantial injury to persons or property. Paragraph (c)(2) permits a lawyer to take steps to rectify the consequences where the lawyer reasonably believes the lawyer's services had been used for crime or fraud although not required by paragraph (b) to do so.

With regard to paragraph (c)(3), DR 4-101(C)(4) provided that a lawyer may reveal "[c]onfidences or secrets necessary to establish or collect [the lawyer's] fee or to defend himself [or herself] or his [or her] employees or associates against an

accusation of wrongful conduct." Paragraph (c)(3) enlarges the exception to include disclosure of information relating to claims by the lawyer other than for the lawyer's fee; for example, recovery of property from the client.

(Amended effective November 18, 1994.)

Rule 1.7. CONFLICT OF INTEREST: GENERAL RULE.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

COMMENT:

Loyalty to a Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

[5] A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. The concept of consent includes a knowledgeable and informed waiver. The process of obtaining informed consent will vary greatly from case to case, and in some instances will require a recommendation to consult independent counsel.

Lawyer's Interests

[6] The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

[7] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory

interpretation.

[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[12] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing

counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

Hawaiʻi Code Comparison

DR 5-101(A) provided that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of [the lawyer's] professional judgment on behalf of the client will be or reasonably may be affected by [the lawyer's] own financial, business, property, or personal interests." DR 5-105(A) provided that a lawyer "shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C)." DR5-105(C) provided that "a lawyer may represent multiple clients if it is obvious that [the lawyer] can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of [the lawyer's] independent professional judgment on behalf of each." DR 5-107(B) provided that a lawyer "shall not permit a person who recommends, employs, or pays [the lawyer] to render legal services for another to direct or regulate [the lawyer's] professional judgment in rendering such services."

Rule 1.7 clarifies DR 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent but also that, independent of such consent, the representation reasonably appears not to be adversely affected by the lawyer's other interests. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it is obvious that [the lawyer] can adequately represent" the client, and was implicit in EC 5-2, which stated that a lawyer "should not accept proffered employment if [the lawyer's] personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client."

Rule 1.8. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6, Rule 3.3, or Rule 4.1.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice and shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

COMMENT:

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] A lawyer may accept a gift from a client if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

[3] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication

value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for Lawyer's Services

[4] Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers

[5] Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation

[6] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

[7] This rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

[8] See Rule 1.7, comment 5.

Hawaiʻi Code Comparison

With regard to paragraph (a), DR 5-104(A) provided that a lawyer "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his [or her] professional judgment therein for the protection of the client, unless the client has consented after full disclosure." EC 5-3 stated that a lawyer "should not seek to persuade his [or her] client to permit [the lawyer] to invest in an undertaking of his [or her] client nor make improper use of [the lawyer's] professional relationship to influence his [or her] client to invest in an enterprise in which the lawyer is interested."

With regard to paragraph (b), DR 4-101(B)(3) provided that a lawyer should not use "a confidence or secret of his [or her] client for the advantage of [the lawyer], or of a third person, unless the client consents after full disclosure."

There was no counterpart to paragraph (c) in the Disciplinary Rules of the Hawaiʻi Code. EC 5-5 stated that a lawyer "should not suggest to his [or her] client that a gift be made to [the lawyer] or for his [or her] benefit. If a lawyer accepts a gift from his [or her] client, [the lawyer] is peculiarly susceptible to the charge that [the lawyer] unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his [or her] lawyer, the lawyer may accept the gift, but before doing so, [the lawyer] should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his [or her] client desires to name [the lawyer] beneficially be prepared by another lawyer selected by the client."

Paragraph (d) is substantially similar to DR 5-104(B), but refers to "literary or media" rights, a more generally inclusive term than "publication" rights.

Paragraphs (e)(1) and (e)(2) are nearly identical to DR 5-103(B)(1) and (2).

Paragraph (f) is substantially identical to DR 5-107(A)(1).

Paragraph (g) is substantially identical to DR 5-106.

The first clause of paragraph (h) is similar to DR 6-102(A). There was no counterpart in the Hawai'i Code to the second clause of paragraph (h).

Paragraph (i) has no counterpart in the Hawai'i Code.

Paragraph (j) is substantially identical to DR 5-103(A).

Rule 1.9. CONFLICT OF INTEREST: FORMER CLIENT.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

COMMENT:

[1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

[2] The scope of a "matter" for purposes of this rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not necessarily precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Lawyers Moving Between Firms

[3] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[4] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[5] The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

Confidentiality

[6] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[7] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is

sought.

[8] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[9] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions

[10] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

[11] Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[12] Disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

[13] With regard to an opposing party's raising a question of conflict of interest, see comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

[14] See Rule 1.7, comment 5.

Hawai'i Code Comparison

There was no counterpart to this Rule in the Disciplinary Rules of the Hawai'i Code. Representation adverse to a former client was sometimes dealt with under the rubric of Canon 9 of the Model Code, which provided: "A lawyer should avoid even the appearance of impropriety." Also applicable were EC 4-6 which stated that the "obligation of a lawyer to preserve the confidences and secrets of [the lawyer's] client continues after the termination of [the lawyer's] employment" and Canon 5 which stated that "[a] lawyer should exercise independent professional judgment on behalf of a client."

Rule 1.9(a) codifies the holding and analysis of Otaka v. Klein, 71 Haw. 326, 791 P.2d 713 (1990).

The provision for waiver by the former client in paragraphs (a) and (b) is similar to DR 5-105(C).

The exception in the last clause of paragraph (c)(1) permits a lawyer to use information relating to a former client that is in the "public domain," a use that was also not prohibited by the Hawai'i Code, which protected only "confidences and secrets." Since the scope of paragraphs (a) and (b) is much broader than "confidences and secrets," it is necessary to define when a lawyer may make use of information about a client after the client-lawyer relationship

has terminated.

Rule 1.10. IMPUTED DISQUALIFICATION: GENERAL RULE.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A firm disqualification prescribed by this rule may be waived by the affected client by consent after consultation.

(d) The disqualifications of Rules 1.7, 1.9(a), 1.9(b), or 1.11(c)(1) shall not be imputed to government lawyers provided the disqualified government lawyer has been screened from participation in the matter.

COMMENT:

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

[2] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[3] Similar questions can also arise with respect to lawyers in legal aid: Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

[4] Separate units of a government agency, such as the office of attorney general, may undertake concurrent representation that would otherwise offend Rule 1.10(a), so long as no prejudice is suffered by any of the clients. See State v. Klattenhoff, 71 Haw. 598, 801 P.2d 548

(1990).

[5] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rules 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the rules generally, including Rules 1.6, 1.7 and 1.9.

[6] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6, 1.9 and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification

[7] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[8] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

Hawai'i Code Comparison

DR 5-105(D) provided that "[i]f a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of [the lawyer] or [the lawyer's] firm may accept or continue such employment."

(*Amended effective November 18, 1994; further amended June 8, 2001, effective July 1, 2001.*)

Rule 1.11. SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT.

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

COMMENT:

[1] This rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

[2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this rule.

[3] Where the successive clients are a public agency and a private client, the risk

exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provision for screening is necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

[4] When the client is an agency of one government, that agency should be treated as a private client for purposes of this rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

[5] Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

[6] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

[7] Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[8] Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[9] Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Hawai'i Code Comparison

Paragraph (a) is similar to DR 9-101(B), except that the latter used the terms "in which [the lawyer] had substantial responsibility while [the lawyer] was a public employee."

Paragraphs (b), (c), (d) and (e) have no counterparts in the Hawai'i Code.

Rule 1.12. FORMER JUDGE OR ARBITRATOR.

(a) A lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

COMMENT:

[1] This rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore, or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he [or she] served as a judge or in any other proceeding related thereto." Although phrased differently from this rule, those rules correspond in meaning.

Hawaiʻi Code Comparison

Paragraph (a) is substantially similar to DR 9-101(A), which provided that a lawyer "shall not accept private employment in a matter upon the merits of which [the lawyer] has acted in a judicial capacity." Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There was no counterpart in the Hawaiʻi Code to paragraphs (b), (c) or (d).

With regard to arbitrators, EC 5-20 stated that "a lawyer [who] has undertaken to act as an impartial arbitrator or mediator . . . should not thereafter represent in the dispute any of the parties involved." DR 9-101(A) did not permit a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5-105(C) was similar in effect and could be construed to permit waiver.

Rule 1.13. ORGANIZATION AS CLIENT.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization, and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

(f) If a government lawyer knows that an officer, employee or other person associated with the government is engaged in action, intends to act or refuses to act in a matter related to the lawyer's representation that is a violation of a legal obligation to the government or the public, or a violation of law which reasonably might be imputed to the government, the lawyer shall proceed as is reasonably necessary in the best interest of the government or the public. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, governmental policies concerning such matters, governmental chain of command, and any other relevant consideration. Any measures taken shall be designed to minimize disruption of the governmental functions. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) referring the matter to a higher authority in the government, including if warranted by the seriousness of the matter, referral to the highest government official that can act in behalf of the government on the particular matter as determined by applicable law even if the highest authority is not within the agency or department the lawyer represents; and

(3) advising that a separate legal opinion on the matter be sought and considered; and

(4) divulging of information to persons outside the government pursuant to the limitations provided in Rule 1.6.

COMMENT:

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents.

[2] Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this comment apply equally to unincorporated associations. "Other constituents" as used in this comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[3] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[4] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such a review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[7] The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This rule does not limit that authority.

Clarifying the Lawyer's Role

[8] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[9] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[10] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[11] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[12] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Hawai'i Code Comparison

There was no counterpart to this rule in the Disciplinary Rules of the Hawai'i Code. EC 5-18 stated that a "lawyer employed or retained by a corporation or similar entity owes [the lawyer's] allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person

connected with the entity. In advising the entity, a lawyer should keep paramount its interests and [the lawyer's] professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him [or her] in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 stated that although a lawyer "may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his [or her] professional judgment from any lay[person]." DR 5-107(B) provided that a lawyer "shall not permit a person who . . . employs . . . [the lawyer] to render legal services for another to direct or regulate [the lawyer's] professional judgment in rendering such legal services."

Rule 1.14. CLIENT UNDER A DISABILITY.

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

COMMENT:

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

[4] If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Disclosure of the Client's Condition

[5] Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

Hawaiʻi Code Comparison

There was no counterpart to this rule in the Disciplinary Rules of the Hawaiʻi Code. EC 7-11 stated that the "responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client. . . . Examples include the representation of an illiterate or an incompetent." EC 7-12 stated that "[a]ny mental or physical condition of a client that renders [the client] incapable of making a considered judgment on [the client's] own behalf casts additional responsibilities upon [the client's] lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, [the client's] lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of [the client's] interests, regardless of whether [the client] is legally disqualified from performing certain acts, the lawyer should obtain from [the client] all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his [or her] client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of [the lawyer's] client. But obviously a lawyer cannot perform any act or make any decision which the law requires his [or her] client to perform or make, either acting for [the client] if competent, or by a duly constituted representative if legally incompetent."

Rule 1.15. PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT OR THIRD PERSON.

(a) Every lawyer in private practice in the State of Hawaiʻi who receives or handles client funds shall maintain in one or more bank or savings and loan association accounts maintained in this state, in the lawyer's own name, or in the name of a partnership of lawyers, or in the name of the professional corporation of which the lawyer is a member, or in the name of the lawyer or partnership of lawyers by whom employed:

(1) a trust account or accounts, separate from any business and personal accounts, into which all funds entrusted to the lawyer's care shall be deposited; and

(2) a business account into which all earned trust funds for professional services shall be deposited.

(b) Each trust account, as well as deposit slips and checks drawn thereon, shall be prominently labeled "client trust account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account. Client trust account checks shall bear preprinted consecutive numbers. Each business account, as well as deposit slips and checks drawn thereon, shall be prominently labeled "business account," "office account," or

appropriate business-type account.

(c) A lawyer in possession of any funds or other property belonging to a client or third person, where such possession is incident to the lawyer's practice of law, is a fiduciary and shall not commingle such funds or property with his or her own or misappropriate such funds or property to his or her own use and benefit. A lawyer may deposit into a trust account funds reasonably sufficient to either pay bank charges or avoid paying bank charges on the account. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited into the trust account, but the portion belonging to the lawyer or law firm must be withdrawn when due unless the right of the lawyer or law firm to receive the funds is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(d) All funds entrusted to a lawyer shall be deposited intact into a trust account. The deposit slip shall be sufficiently detailed to identify each item. All fee retainers shall be maintained in trust until earned. All fee retainers are refundable until earned.

(e) All trust account withdrawals shall be made only by authorized bank transfer or by check made payable to a named payee and not to cash. Only an attorney admitted to practice law in this state shall be an authorized signatory on an attorney trust account. Earned fees withdrawn from a trust account shall be distributed by check to the named lawyer, law partnership, or professional law corporation. No personal or non-client business expenses of the lawyer, law partnership, or professional law corporation shall be paid directly from the trust account.

(f) A lawyer shall:

(1) promptly notify a client or third person of the lawyer's receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete computerized or manual records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and promptly render appropriate accounts to the client or third person regarding them. The books and records shall be preserved for a [sic] least six years after completion of the employment to which they relate. Every lawyer in private practice shall certify, in connection with the annual renewal of the lawyer's registration, that the lawyer or the lawyer's law firm maintains books and records in compliance with this rule, HRPC Rule 1.15; and

(4) promptly pay or deliver to the client or third person, as requested by the client or third person, the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive.

(g) A lawyer shall, at a minimum, maintain for at least six years after completion of the employment to which they relate, the following computerized or manual books and records demonstrating compliance with this rule, HRPC Rule 1.15:

(1) Cash receipts and disbursements journals for each trust and business account, including entries for receipts, disbursements, and transfers, and also containing at least:

(A) identification of the client matter for which trust funds were received, disbursed, or transferred;

(B) the date on which trust funds were received, disbursed, or transferred;

(C) the check number for each disbursement; and

(D) the payor or payee for which the trust funds were received, disbursed, or transferred.

(2) A subsidiary ledger containing either a separate page for each client (for manual records only) or an equivalent computer analysis showing all individual receipts, disbursements, or transfers and any unexpended balance, and

also containing:

(A) identification of the client or matter for which trust funds were received, disbursed, or transferred;

(B) the date on which trust funds were received, disbursed, or transferred;

(C) the check number for each disbursement; and

(D) the payor or payee for which trust funds were received, disbursed, or transferred.

(3) Copies of any retainer and compensation agreements with clients.

(4) Copies of any statements to clients showing the disbursement of funds to them or on their behalf.

(5) Copies of all bills rendered to clients.

(6) Copies of records showing all payments to attorneys, investigators, or other persons, not in the lawyer's regular employ, for services rendered or performed.

(7) All checkbooks, check stubs, bank statements, prenumbered cancelled checks (or access to cancelled checks), and deposit slips (or access to deposit slips).

(8) Copies of all monthly trust account reconciliations.

(9) Copies of all records showing at least quarterly (i) a listing of trust accounts (names and related balances), the grand total of which agrees with (equals) (ii) the reconciled trust account bank balance of even date (a printed copy of the listing and the reconciled trust account balance shall be maintained for 6 years).

(10) A record showing all property, specifically identified, other than cash, held in trust, provided that routine files and documents which are not expected to be held indefinitely need not be so recorded.

(h) The financial books and other records required by this rule shall be maintained on a cash method consistently applied from year to year. Bookkeeping records may be maintained by computer, provided that they otherwise comply with this rule and provided further that printed copies can be made on demand. Bookkeeping records shall be located at the principal Hawaiʻi office of each lawyer, law partnership, or professional law corporation and shall be available for inspection, checks for compliance with this rule, and copying at that location by a duly authorized representative of the Office of Disciplinary Counsel.

COMMENT:

See Rule 1.5(a) for the factors to be considered in determining the reasonableness of an earned attorney's fee.

Hawaiʻi Code Comparison

ABA Model Rule 1.15 and its comments were rejected in favor of DR 9-102 of the Disciplinary Rules of the Hawaiʻi Code.

(*Amended June 22, 1994, effective July 1, 1994; further amended October 9, 2001, effective January 1, 2002.*)

Rule 1.16. DECLINING OR TERMINATING REPRESENTATION.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the lawyer reasonably believes that the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT:

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written

statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself [or herself].

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer reasonably believes that the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

[10] Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these rules.

Hawai'i Code Comparison

With regard to paragraph (a), DR 2-109(A) provided that a lawyer "shall not accept employment . . . if [the lawyer] knows or it is obvious that [the prospective client] wishes to . . . [b]ring a legal action . . . or otherwise have steps taken for [the prospective client], merely for the purpose of harassing or maliciously injuring any person. . . ." Nor may a lawyer accept employment if the lawyer is aware that the prospective client wishes to "[p]resent a claim or defense . . . that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law." DR 2-110(B) provided that a lawyer "shall withdraw from employment . . . if:

"(1) [The lawyer] knows or it is obvious that [the lawyer's] client is bringing the legal action . . . or is otherwise having steps taken for [the client] for the purpose of harassing or maliciously injuring any person.

"(2) [The lawyer] knows or it is obvious that [the lawyer's] continued employment will result in violation of a Disciplinary Rule.

"(3) [The lawyer's] mental or physical condition renders it unreasonably difficult for [the lawyer] to carry out the employment effectively.

"(4) [The lawyer] is discharged by [the lawyer's] client."

With regard to paragraph (b), DR 2-110(C) permitted withdrawal regardless of the effect on the client if:

"(1) [The lawyer's] client: (a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; (b) Personally seeks to pursue an illegal course of conduct; (c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules; (d) By other conduct renders it unreasonably difficult for the lawyer to carry out [the lawyer's] employment effectively; (e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules; (f) Deliberately disregards an agreement or obligation to the lawyer as to expenses and fees.

"(2) [The lawyer's] continued employment is likely to result in a violation of a Disciplinary Rule.

"(3) [The lawyer's] inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal.

"(4) [The lawyer's] mental or physical condition renders it difficult for [the lawyer] to carry out the employment effectively.

"(5) [The lawyer's] client knowingly and freely assents to termination of his [or her] employment.

"(6) [The lawyer] believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal."

With regard to paragraph (c), DR 2-110(A)(1) provided: "If permission for withdrawal from employment is required by the rules of a tribunal, the lawyer shall not withdraw . . . without its permission."

The provisions of paragraph (d) are substantially identical to DR 2-110(A)(2) and (3).

Rule 1.17. SALE OF LAW PRACTICE.

A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in the State of Hawaiʻi and the Federal District of Hawaiʻi;

(b) The practice is sold as an entirety to another lawyer or law firm;

(c) Actual written notice is given to each of the seller's clients regarding:

(1) the proposed sale and the identity of the purchaser;

(2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);

(3) the client's right to retain other counsel or to take possession of the file; and

(4) the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

The fees charged clients shall not be increased by reason of the sale. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents in writing after consultation.

COMMENT:

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing

partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity which provides legal services to the poor, or as in-house counsel to a business.

[4] The rule permits a sale attendant upon retirement from the private practice of law within the jurisdiction.

Single Purchaser

[5] The rule requires a single purchaser. The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent.

Client Confidences, Consent and Notice

[6] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[8] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[9] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents after

consultation.

[10] The purchaser may not intentionally fragment the practice which is the subject of the sale by charging significantly different fees in substantially similar matters. Doing so would make it possible for the purchaser to avoid the obligation to take over the entire practice by charging arbitrarily higher fees for less lucrative matters, thereby increasing the likelihood that those clients would not consent to the new representation.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (see Rule 1.7); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

[15] This rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

Hawaiʻi Code Comparison

There was no counterpart to this rule in the Hawaiʻi Code.

COUNSELOR

Rule 2.1. ADVISOR.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. In a matter involving or expected to involve litigation, a lawyer should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

COMMENT:

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Hawaiʻi Code Comparison

There was no direct counterpart to this rule in the Disciplinary Rules of the Hawaiʻi Code. DR 5-107(B) provided that a lawyer "shall not permit a person who recommends, employs, or pays [the lawyer] to render legal services for another to direct or regulate [the lawyer's] professional judgment in rendering such legal services."

EC 7-8 stated that "[a]dvice of a lawyer to [the lawyer's] client need not be confined to purely legal considerations. . . . In assisting [the lawyer's] client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for [the lawyer]." EC 7-9 stated that "a lawyer should always act in a manner consistent with the best interests of [the lawyer's] client."

Rule 2.2. INTERMEDIARY.

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so request, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

COMMENT:

[1] A lawyer acts as intermediary under this rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

[2] The rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

[3] A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even

litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

[4] In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

[5] The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

[6] A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[7] Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

[8] In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

[9] Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

[10] Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

Hawaiʻi Code Comparison

There was no direct counterpart to this rule in the Disciplinary Rules of the Hawaiʻi Code. EC 5-20 stated that a "lawyer is often

asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. [A lawyer] may serve in either capacity if [the lawyer] first discloses such present or former relationships." DR 5-105(B) provided that a lawyer "shall not continue multiple employment if the exercise of [the lawyer's] independent professional judgment in behalf of a client will be or is likely to be adversely affected by [the lawyer's] representation of another client, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provided that "a lawyer may represent multiple clients if it is obvious that [the lawyer] can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of [the lawyer's] independent professional judgment on behalf of each."

Rule 2.3. EVALUATION FOR USE BY THIRD PERSONS.

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

COMMENT:

Definition

[1] An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

[3] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

[4] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the

scope of this rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[5] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the non-cooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Hawaiʻi Code Comparison

There was no counterpart to this rule in the Hawaiʻi Code.

ADVOCATE

Rule 3.1. MERITORIOUS CLAIMS AND CONTENTIONS.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT:

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Hawaiʻi Code Comparison

DR 7-102(A)(1) provided that a lawyer may not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of [the lawyer's] client when [the lawyer] knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Rule 3.1 has the same general effect as DR 7-102(A)(1), with three qualifications. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applied only if the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.

Rule 3.2. EXPEDITING LITIGATION.

A lawyer shall make reasonable efforts to expedite litigation consistent with the legitimate interests of the client.

COMMENT:

Dilatory practices bring the administration of justice into disrepute. Significant delay should not be indulged merely for the convenience of the advocates, or for the purposes of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some

substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Hawai'i Code Comparison

DR 7-101(A)(1) stated that a lawyer does not violate the duty to represent a client zealously "by being punctual in fulfilling all professional commitments." DR 7-102(A)(1) provided that a lawyer "shall not . . . file a suit, assert a position, conduct a defense or delay a trial . . . when [the lawyer] knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Rule 3.3. CANDOR TOWARD THE TRIBUNAL.

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take remedial measures to the extent reasonably necessary to rectify the consequences.

(b) The duties stated in paragraphs (a) and (d) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6(a).

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding except grand jury proceedings and applications for search warrants, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse, disclosure of which is not otherwise prohibited by law.

COMMENT:

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[2] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the comment to that rule. See also the comment to Rule 8.4(b).

Misleading Legal Argument

[3] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal

authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. Suspicions and hunches are insufficient to substantiate the degree of falsity necessary to refuse to offer evidence.

[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take remedial measures to the extent reasonably necessary to rectify the consequences.

[6] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

[7] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

[8] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[9] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[10] The other resolution of the dilemma is that the lawyer must reveal the client's

perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

[11] If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

[12] The general rule - that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client - applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these rules is subordinate to such a constitutional requirement.

Duration of Obligation

[13] A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

[14] Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

[15] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts

known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Hawaiʻi Code Comparison

Paragraph (a)(1) is substantially identical to DR 7-102(A)(5), which provided that a lawyer shall not "knowingly make a false statement of law or fact."

Paragraph (a)(2) is implicit in DR 7-102(A)(3), which provided that "a lawyer shall not . . . knowingly fail to disclose that which [the lawyer] is required by law to reveal."

Paragraph (a)(3) is substantially identical to DR 7-106(B)(1).

With regard to paragraph (a)(4), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provided that a lawyer shall not "knowingly use" perjured testimony or false evidence. The second sentence of paragraph (a)(4) resolves an ambiguity in the Hawaiʻi Code concerning the action required of a lawyer who discovers that the lawyer has offered perjured testimony or false evidence. DR 7-102(A)(4) did not expressly deal with this situation, but the prohibition against "use" of false evidence can be construed to preclude carrying through with a case based on such evidence when that fact has become known during the trial. DR 7-102(B)(1) provided that a lawyer "who receives information clearly establishing that . . . [the lawyer's] client has . . . perpetrated a fraud upon . . . a tribunal shall promptly call upon [the lawyer's] client to rectify the same, and if [the lawyer's] client refuses or is unable to do so, . . . reveal the fraud to the . . .. tribunal. . . ." Since use of perjured testimony or false evidence is usually regarded as "fraud" upon the court, DR 7-102(B)(1) apparently required disclosure by the lawyer in such circumstances. Paragraph (a)(4) requires that the lawyer take remedial measures "to the extent reasonably necessary to rectify the consequences."

Comment [4] further clarifies what degree of knowledge of falsity a lawyer must have in order to fall within paragraph (a)(4). It states that mere "suspicions and hunches" do not suffice.

Paragraph (c) confers discretion on the lawyer to refuse to offer evidence that the lawyer "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibited the lawyer from offering evidence the lawyer "knows" is false.

There was no counterpart in the Hawaiʻi Code to paragraph (d).

Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence or counsel or assist a witness to testify falsely;

(c) offer an inducement that is prohibited by law or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of [the witness'] testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for [the witness'] loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness;

(d) advise or cause a person to secrete himself [or herself] or to leave the jurisdiction of a tribunal for the purpose of making [the person] unavailable as a witness therein;

(e) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation

exists;

(f) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(g) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

(h) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; or

(i) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

COMMENT:

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] Paragraph (h) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Hawaiʻi Code Comparison

With regard to paragraph (a), DR 7-109(A) provided that a lawyer "shall not suppress any evidence that [the lawyer] or [the lawyer's] client has a legal obligation to reveal." DR 7-106(C)(7) provided that a lawyer shall not "[i]ntentionally or habitually violate any established rule of procedure or of evidence."

With regard to paragraph (b), DR 7-102(A)(6) provided that a lawyer shall not participate "in the creation or preservation of evidence when [the lawyer] knows or it is obvious that the evidence is false."

Paragraph (c) adds a general prohibition against offering inducements prohibited by law to its verbatim adoption of DR 7-109(C). EC 7-28 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Paragraph (d) is a verbatim adoption of DR 7-109(D).

Paragraph (e) is substantially similar to DR 7-106(A), which provided that "A lawyer shall not disregard . . . a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but [the lawyer] may take appropriate steps in good faith to test the validity of such rule or ruling."

Paragraph (f) has no counterpart in the Hawaiʻi Code.

Paragraph (g) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribed asking a question "intended to degrade a witness or

other person," a matter dealt with in Rule 4.4. DR 7-106(C)(5), providing that a lawyer shall not "fail to comply with known local customs of courtesy or practice," was too vague to be a rule of conduct enforceable as law.

With regard to paragraph (h), DR 7-104(A)(2) provided that a lawyer shall not "give advice to a person who is not represented . . . other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of [the lawyer's] client."

Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL.

(a) Influencing Decision Maker. A lawyer shall not seek to influence a judge, juror, prospective juror, discharged juror, or other decision maker by means prohibited by law.

(b) Harassing or Embarrassing Decision Maker. A lawyer shall not harass a judge, juror, prospective juror, discharged juror, or other decision maker or embarrass such person in such capacity.

(c) Disruption of Tribunal. A lawyer shall not engage in conduct intended or reasonably likely to disrupt a tribunal.

(d) Communication with a Judge or Official. In an adversary proceeding, a lawyer shall not communicate as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

(1) in the course of the official proceeding in the cause;

(2) in writing if the lawyer promptly delivers a copy of the writing to the opposing counsel or to the adverse party if not represented by a lawyer; or

(3) orally upon notice to opposing counsel or to the adverse party if not represented by a lawyer.

(e) Communication with Jurors. A lawyer shall not:

(1) before the trial of a case with which the lawyer is connected, communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected, with respect to the case or with the intent or reasonable likelihood of influencing the member with respect to the case;

(2) during the trial of a case with which the lawyer is connected, communicate with a juror except in the course of the proceedings, with the judge and opposing counsel present;

(3) during the trial of a case with which the lawyer is not connected, communicate with a juror concerning the case;

(4) after dismissal of the jury in a case with which the lawyer is connected, communicate with a juror regarding the trial except that:

(i) upon leave of the court, which leave shall be freely granted, a lawyer may ask questions of, or respond to questions from, jurors about the trial, provided that the lawyer does so in a manner that is not calculated to harass or embarrass any juror and does not seek to influence the juror's actions in future jury service in any particular case; and

(ii) upon leave of the court for good cause shown, a lawyer who believes there are grounds for legal challenge to a verdict may conduct an in-court examination of jurors or former jurors to determine whether the verdict is subject to challenge. A motion for in-court examination of discharged jurors under this subsection (e)(4)(ii) shall be served no later than ten (10) days after the judgment has been entered unless good cause is shown for the failure to serve the motion within that time. If the examination is permitted, the court shall prescribe, the time, manner, place, and scope of the examination.

COMMENT:

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. A lawyer is required to avoid contributing to a violation of such provisions.

[2] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[3] It has long been recognized and acknowledged that post-discharge respectful conduct between a trial lawyer (or those acting on the lawyer's behalf) and jurors before whom the lawyer has appeared benefits both the lawyer and the jurors. The lawyer may gain insights that enable the lawyer to better represent future clients and the juror may have some mysteries (usually related to the admission or rejection of evidence) solved so as to better appreciate the workings of the justice system. In addition, it is not at all uncommon for lawyers and judges to talk casually about a former case that has become final. Hawaiʻi's original HRPC 3.5(a) and (b), adopted in December 1993, provided:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

Original HRPC 3.5(a) and (b) appeared to preclude "all post-trial communications between attorneys and jurors, relating to the subject matter of the trial, in the presence of all parties to the proceeding or their legal representatives." State v. Furutani, 76 Hawaiʻi 172, 177, n.8, 873 P.2d 51, 56 n.8 (1994). The same prohibition would logically have applied to lawyer-judge post-decision contacts. The supreme court asserted that HRPC 3.5 prohibited post-trial contact that was permissible under DR 7-108 of the prior Code of Professional Responsibility. Id.

As interpreted, original HRPC 3.5 prohibited post-trial contact in an oblique manner: original paragraph (a) precluded seeking "to influence a judge, juror, prospective juror or other official" while original paragraph (b) precluded "communicat[ion] ex parte with such a person." A discharged juror was not specifically referenced in original HRPC 3.5(a)-(c). Original HRPC 3.5 referred to jurors and prospective jurors. There are sound public policy reasons for precluding ex parte contact with jurors and prospective jurors, and limiting contact with discharged jurors.

Enforcement of original HRPC 3.5(b) was enjoined by the United States District Court for the District of Hawaiʻi in Rapp v. Disciplinary Board, United States District Court Civ. No. 95-00779 DAE. While the Rapp case was pending in federal court the supreme court proposed, the Hawaiʻi State Bar Association approved, and, on May 8, 1996, the supreme court adopted amendments so that HRPC 3.5 provided:

Rule 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not:

(1) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(2) communicate ex parte with such a person except as provided in subsection (b) of this rule; or

(3) engage in conduct intended to disrupt a tribunal.

(b) After the jury is discharged, a lawyer may ask questions of, or respond to questions from, jurors provided the lawyer does so in a manner that neither harasses nor embarrasses the juror and does not seek to influence the juror's actions in future jury service. Likewise, after final disposition of a matter a lawyer may ask questions of a

judge or other official regarding the matter and may respond to questions from the judge or other official, provided the lawyer does so in a manner that neither harasses nor embarrasses the judge or official and does not seek to influence the judge's or official's actions in future judicial or official service. A juror or judge is free to refuse to comment or respond.

In anticipation of further amendment after a decision in Rapp v. Disciplinary Board, subsection (b) was intended to be an interim rule.

In Rapp, the United States District Court for the District of Hawaiʻi concluded:

. . . that [original HRPC] 3.5(b) as interpreted and applied suffer[ed] from two chief infirmities. First, the language of the rule prohibiting ex parte communication with jurors "except as permitted by law," is unconstitutionally vague and overbroad. . . . The plain language of [original] Rule 3.5(b) [did] not specifically indicate whether a judge ha[d] the authority to grant leave, or whether "good cause" or "exigent circumstances" for seeing the interviews must be shown. Moreover, this court has not found any Hawaiʻi case law which either sets forth an exception to [original] Rule 3.5(b) in circumstances where counsel suspect that jury misconduct has occurred or a procedure that an attorney needs to follow if that attorney does have suspicions. Additionally, no Hawaiʻi case has discussed what might amount to good cause warranting jury interviews, if good cause is the applicable standard. . . . [I]t is unclear how the rule would be applied in circumstances which may warrant the grant of post verdict interviews by a trial court. That is, a description of the mechanism for review by a trial judge is conspicuously absent from the rule. Moreover, the standard "as permitted by law" provides little guidance to lawyers as to when jurors can appropriately be contacted. . . .

Second, the probable efficacy of [original] Rule 3.5, as it has been interpreted by the Hawaiʻi Supreme Court, in protecting jury members and their verdicts is minimal at best. . . . If the aim of Rule 3.5 is to protect the sanctity of jury verdicts and prevent jury harassment, it misses the mark. Instead, as interpreted, the rule would theoretically allow two unscrupulous lawyers who agree to interview jurors together, to engage in a jury harassment "free for all" with no court supervision. Clearly, the limitations [original] Rule 3.5 places on ex parte jury communications is not well-tailored to achieve the State's compelling interests.

The United States District Court concluded:

. . . the State Defendants have demonstrated a compelling interest in preserving the integrity of the trial process by protecting jurors from post trial harassment and unnecessary intrusion by lawyers. There is no question that a properly tailored rule . . . can pass constitutional muster.

The United States District recognized two compelling state interests that could justify a rule restricting attorney contact with jurors: "[1] the public policy holding jury deliberations and verdicts inviolable and [2] the aim of protecting the privacy of jurors." However, the United States District Court concluded original HRPC 3.5(b) was not sufficiently tailored to meet the State's compelling interests and enjoined its enforcement.

Upon review of the United States District Court's order, the Supreme Court of Hawaiʻi proposed additional amendments to Rule 3.5. After discussions with the Hawaiʻi State Bar Association and the Disciplinary Board and consideration of the concerns expressed by those entities, the supreme court adopted the current rule. The current rule eliminates the phrase "as permitted by law." In furtherance of the valid public policy interests in keeping jury deliberations inviolable and protecting the privacy of jurors, subdivision (e) retains the trial judge as the gatekeeper between the attorneys and the jury.

Further, subdivision (e) sets standards by which to determine requests for post-discharge juror interviews. Subdivision (e)(4)(i) recognizes that respectful post-discharge debriefing of a jury is beneficial to both lawyers and jurors. The possibility of jury harassment requires the oversight of the judge, but where the purpose of the requested interview is to educate the lawyer and the jury, the value of respectful debriefing in such that leave for respectful post-trial debriefing should be freely granted. Subdivision (e)(4)(i) presumes that discharged jurors are free to decline participation in such post-trial debriefings. Subdivision (e)(4)(ii) is designed to enforce the policies of holding jury thought processes inviolable and protecting the privacy of jurors. Thus, to avoid juror harassment by unscrupulous lawyers and lawyers on fishing expeditions, as well as the jury harassment free for all referred to by the United States District Court, an attorney seeking to challenge a verdict due to jury irregularity must (i) show good cause for a belief that grounds for a challenge exist, (ii) obtain leave of the court to question a juror or jurors and, if the motion to examine the jury is granted, (iii) conduct the examination in court and under conditions set by the judge. In sum, Rule 3.5(e) provides oversight by the trial judge, circumstances in which communications with jurors are permitted, and standards by which to decide requests to interview discharged jurors.

Hawai'i Code Comparison

With regard to paragraphs (a) and (b), DR 7-108(A) provided that "[b]efore the trial of a case a lawyer . . . shall not communicate with . . . anyone [the lawyer] knows to be a member of the venire. . . ." DR-7-108(B) provided that during the trial of a case a lawyer "shall not communicate with . . . any member of the jury." DR 7-110(B)(3) and (4) provided that a lawyer shall not "communicate . . . as to the merits of the cause with a judge or an official before whom the proceeding is pending, except . . . upon adequate notice to opposing counsel," or as "otherwise authorized by law."

With regard to paragraph (c), DR 7-106(C)(6) provided that a lawyer shall not engage in "undignified or discourteous conduct which is degrading to a tribunal."

(Amended October 24, 1996, effective November 15, 1996; further amended effective November 20, 1996.)

Rule 3.6. TRIAL PUBLICITY.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT:

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(e) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer making a statement that the lawyer knows or should know will have substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not

involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Hawaiʻi Code Comparison

Rule 3.6 is similar to DR 7-107, except as follows: First, Rule 3.6 adopts the general criteria of "substantial likelihood of materially prejudicing an adjudicative proceeding" to describe impermissible conduct. Second, Rule 3.6 transforms the particulars in DR 7-107 into an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice. Finally, Rule 3.6 omits DR 7-107(C)(7), which provided that a lawyer may reveal "[a]t the time of seizure, a description of the physical

evidence seized, other than a confession, admission or statement." Such revelations may be substantially prejudicial and are frequently the subject of pretrial suppression motions, which, if successful, may be circumvented by prior disclosure to the press.

(Amended September 8, 1999, effective January 1, 2000.)

Rule 3.7. LAWYER AS WITNESS.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT:

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

[5] A recurring situation involves the lawyer as impeaching witness, that is, as the means by which another witness' prior inconsistent statement is to be proved. In such a situation the need for such impeachment should be foreseen not only in preparation for trial but even in advance of the initial witness interview that produced the impeaching material. Cf. ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4-43(d): "[T]he lawyer should avoid interviewing a prospective witness except in the presence of a third person."

[6] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or Rule 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a

witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

Hawai'i Code Comparison

DR 5-102(A) prohibited a lawyer, or the lawyer's firm, from serving as advocate if the lawyer "learns or it is obvious that [the lawyer] or a lawyer in his [or her] firm ought to be called as a witness on behalf of [the lawyer's] client." DR 5-102(B) provided that a lawyer, and the lawyer's firm, may continue representation if the "lawyer learns or it is obvious that [the lawyer] or a lawyer in his [or her] firm may be called as a witness other than on behalf of [the lawyer's] client . . . until it is apparent that [the lawyer's] testimony is or may be prejudicial to [the lawyer's] client." DR 5-101(B) permitted a lawyer to testify while representing a client: "(1) If the testimony will relate solely to an uncontested matter; (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or [the lawyer's] firm to the client; (4) As to any matter if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or [the lawyer's] firm as counsel in the particular case."

The exception stated in paragraph (a)(1) consolidates provisions of DR 5-101(B)(1) and (2). Testimony relating to a formality, referred to in DR 5-101(B)(2), in effect defines the phrase "uncontested issue," and is redundant.

Rule 3.8. PERFORMING THE DUTY OF PUBLIC PROSECUTOR OR OTHER GOVERNMENT LAWYER.

A public prosecutor or other government lawyer shall:

(a) not institute or cause to be instituted criminal charges when [the prosecutor or government lawyer] knows or it is obvious that the charges are not supported by probable cause; and

(b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

COMMENT:

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] The exception in paragraph (b) recognizes that a prosecutor may seek an appropriate protective order from the

tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[3] "Defense" as used in paragraph (b) refers to defense lawyer or defendant if unrepresented.

[4] See Rule 3.6(d) for restrictions on extrajudicial statements by investigators and other persons employed by lawyers in criminal cases.

Hawaiʻi Code Comparison

Paragraph (a) incorporates DR 7-103(A) verbatim. DR 7-103(B) provided that "[a] public prosecutor . . . shall make timely disclosure . . . of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

Rule 3.9. ADVOCATE IN NON-ADJUDICATIVE PROCEEDINGS.

A lawyer representing a client before a legislative or administrative body in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (e), and 3.5.

COMMENT:

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

Hawaiʻi Code Comparison

EC 7-15 stated that a lawyer "appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of [the lawyer's] client within the bounds of the law." EC 7-16 stated that "[w]hen a lawyer appears in connection with proposed legislation, [the lawyer] . . . should comply with applicable laws and legislative rules." EC 8-5 stated that "[f]raudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a . . . legislative body . . . should never be participated in . . . by lawyers." DR 7-106(B)(1) provided that "[i]n presenting a matter to a tribunal, a lawyer shall disclose . . . [u]nless privileged or irrelevant, the identity of the clients [the lawyer] represents and of the persons who employed [the lawyer]."

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

COMMENT:

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statement of Fact

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

[3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud.

Hawai'i Code Comparison

Paragraph (a) is substantially similar to DR 7-102(A)(5), which stated that "[i]n [the lawyer's] representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact."

With regard to paragraph (b), DR 7-102(A)(3) provided that a lawyer shall not "[c]onceal or knowingly fail to disclose that which [the lawyer] is required by law to reveal."

Rule 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

COMMENT:

[1] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authority for communicating with a represented person is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

[2] Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the

commencement of criminal or civil enforcement proceedings, where there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.

[3] This Rule also applies to communications with any person whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[4] In the case of an organization, this rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare HRPC 3.4(h).

[5] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Terminology. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[6] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to HRPC 4.3.

Hawaiʻi Code Comparison

This rule is substantially identical to DR 7-104(A)(1).

(*Amended May 7, 2001, effective July 1, 2001.*)

Rule 4.3. DEALING WITH UNREPRESENTED PERSON.

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) During the course of [the lawyer's] representation of a client a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such a person are or have a reasonable possibility of being in conflict with the interests of [the lawyer's] client.

COMMENT:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.

Hawaiʻi Code Comparison

There was no direct counterpart to Paragraph [a] in the Hawaiʻi Code. Paragraph [b] is taken verbatim from DR 7-104(A)(2).

Rule 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS.

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

COMMENT:

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

Hawai'i Code Comparison

DR 7-106(C)(2) provided that a lawyer shall not "[a]sk any question that [the lawyer] has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." DR 7-102(A)(1) provided that a lawyer shall not "take . . . action on behalf of his [or her] client when [the lawyer] knows or when it is obvious that such action would serve merely to harass or maliciously injure another." DR 7-108(D) provided that "[a]fter discharge of the jury . . . the lawyer shall not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror. . . ." DR 7-108(E) provided that a lawyer "shall not conduct . . . a vexatious or harassing investigation of either a venireman or a juror."

LAW FIRMS AND ASSOCIATIONS

Rule 5.1. RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER.

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT:

[1] Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

[2] The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical

atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the rules.

[3] Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

[4] Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partners' involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension. A lawyer's knowledge of conduct referred to in (c)(2) means knowledge of the circumstances which render the conduct a violation.

[5] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[6] Apart from this rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

Hawaiʻi Code Comparison

There was no direct counterpart to this rule in the Hawaiʻi Code. DR 1-103(A) provided that a lawyer "possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to . . . authority empowered to investigate or act upon such violation."

Rule 5.2. RESPONSIBILITIES OF A SUBORDINATE LAWYER.

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

COMMENT:

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For

example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Hawaiʻi Code Comparison

There was no counterpart to this rule in the Hawaiʻi Code.

Rule 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyers; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT:

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Hawaiʻi Code Comparison

There was no direct counterpart to this rule in the Hawaiʻi Code. DR 4-101(D) provided that a lawyer "shall exercise reasonable care to prevent [the lawyer's] employees, associates, and others whose services are utilized by [the lawyer] from disclosing or using confidences or secrets of a client. . . ." DR 7-107(J) provided that "[a] lawyer shall exercise reasonable care to prevent [the lawyer's] employees and associates from making an extrajudicial statement that [the lawyer] would be prohibited from making under DR 7-107."

(*Amended effective November 18, 1994.*)

Rule 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer. A lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) Except as otherwise permitted by the Rules of the Supreme Court of the State of Hawai'i, a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT:

[1] The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] Subsection (b) only applies if legal services are sold by the partnership to third persons or entities other than the partnership itself.

Hawai'i Code Comparison

Paragraph (a) is similar but not identical to DR 3-102(A).

Paragraph (b) is substantially identical to DR 3-103(A).

Paragraph (c) is substantially identical to DR 5-107(B).

Paragraph (d) is substantially identical to DR 5-107(C) of the Model Code but was not in the Hawai'i Code.

(*Amended February 4, 2000, effective July 1, 2000*).

Rule 5.5. UNAUTHORIZED PRACTICE OF LAW.

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law; or

(c) allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer to have any contact with the clients of the lawyer either in person, by telephone, or in writing or to have any contact with persons who have legal dealings with the office either in person, by telephone, or in writing.

COMMENT:

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Paragraph (c) prohibits an attorney who employs or otherwise utilizes a lawyer who is suspended or disbarred, or who resigned in lieu of discipline, from allowing that lawyer to have any contact with the attorney's clients or others who have legal dealing with the attorney's office. In order to protect the public, strict prohibitions are essential to prevent permissible paralegal activities from crossing the line to giving legal advice, taking fees, or misleading clients and others who deal with the attorney's office.

Hawaiʻi Code Comparison

With regard to paragraph (a), DR 3-101(B) of the Hawaiʻi Code provided that "[a] lawyer shall not practice law in the State of Hawaiʻi unless [the lawyer] is licensed by the Supreme Court of Hawaiʻi to do so except that any lawyer may be permitted to associate himself with a member of the bar of the State of Hawaiʻi in the presentation of a specific case at the discretion of the presiding judge or judges as authorized by Rule 1(d) of the Supreme Court of Hawaiʻi."

With regard to paragraph (b), DR 3-101(A) of the Hawaiʻi Code provided that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law."

(*Amended June 8, 2001, effective July 1, 2001.*)

Rule 5.6. RESTRICTIONS ON RIGHT TO PRACTICE.

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

COMMENT:

[1] An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Hawaiʻi Code Comparison

This rule is substantially similar to DR 2-108.

PUBLIC SERVICE

Rule 6.1. PRO BONO SERVICE.

A lawyer should aspire to provide at least fifty hours of pro bono services per year. In fulfilling this responsibility, the lawyer should:

(a) provide at least twenty-five hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means. Where, in a given year, the lawyer experiences personal or employment circumstances that make it unduly difficult or impossible to provide services which qualify as pro bono activity, the lawyer may substitute such a financial contribution for direct pro bono legal services.

COMMENT:

Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. This rule urges all lawyers to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that at least 25 hours of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making, and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government attorneys, even when restrictions exist on their engaging in the outside practice of law.

Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means.

Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b).

Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono attorney to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

Paragraph (b)(2) covers instances in which attorneys agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator, and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

The responsibility set forth in this rule is not intended to be enforced through disciplinary process.

Rule 6.2. ACCEPTING APPOINTMENTS.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer;

or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

COMMENT:

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules. Employment as a government attorney can be good cause to avoid appointment by a tribunal.

Hawaiʻi Code Comparison

There was no counterpart to this rule in the Disciplinary Rules of the Hawaiʻi Code. EC 2-29 stated that when a lawyer is "appointed by a court to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, [the lawyer] should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case." EC 2-30 stated that "a lawyer should decline employment if the intensity of [the lawyer's] personal feelings, as distinguished from a community attitude, may impair [the lawyer's] effective representation of a prospective client."

(*Amended effective November 18, 1994.*)

Rule 6.3. MEMBERSHIP IN LEGAL SERVICES ORGANIZATION.

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT:

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Hawaiʻi Code Comparison

There was no counterpart to this rule in the Hawaiʻi Code.

Rule 6.4. LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS.

A lawyer may serve as a director, officer,or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client.

COMMENT:

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted. This rule applies to lawyers who are also lobbyists and legislators.

Hawaiʻi Code Comparison

There was no counterpart to this rule in the Hawaiʻi Code.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

COMMENT:

This rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful.

Hawai'i Code Comparison

DR 2-101(A) provided that a lawyer "shall not . . . use or participate in the use of any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim." DR 2-101(B) listed in seven subsections examples of false, fraudulent, misleading, or deceptive statements or claims. DR 2-101(C) prohibited a lawyer's use of a public communication (1) which "[i]s intended or is likely to result in a legal action or in a legal position being asserted merely to harass or maliciously injure another," (2) containing "statistical data or other information based on past performance or predictions of future success," (3) containing "a statement of opinion as to the quality of the services or . . . a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public," or (4) which "appeals primarily to a layperson's fear, greed, desire for revenge, or similar emotion."

Rule 7.2. ADVERTISING.

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio, or television, or through written or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or qualified legal assistance organization; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

COMMENT:

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part

through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[4] Neither this rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

[6] A lawyer is allowed to pay for advertising permitted by this rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees changed by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this rule.

See the Terminology section for the definition of "qualified legal assistance organization" reference in subsection (c)(2).

Hawai'i Code Comparison

With regard to paragraph (a), there was no direct counterpart in the Hawai'i Code, although DR 2-102(A) provided that a lawyer "shall not use or participate in the use of a professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal directory listing, or similar professional notice, or device if it includes a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or DR 2-101(C)."

With regard to paragraph (b), DR 2-101(D) provided that "[i]f the paid advertisement is communicated to the public by use of radio or television, it shall be pre-recorded, approved for broadcast by the lawyer and a recording of the actual transmission shall be retained by the

lawyer." DR 2-101(D) provided that a paid advertisement "must be identified as such unless it is apparent from the context that it is a paid advertisement."

With regard to paragraph (c), DR 2-103(D) provided that a lawyer "shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client, except that the lawyer may pay for public communications permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association." DR 2-101(D) provided that a lawyer "shall not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item."

There were no counterparts to paragraphs (c)(3) and (d) in the Hawai'i Code.

Rule 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS.

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client with whom the lawyer has no family or prior professional relationship shall be subject to the requirements of Rules 7.1 and 7.2 and shall include the words "Advertising Material" (1) on the outside envelope and at the top of the first page of the contents of the envelope, and (2) at the beginning and ending of any recorded communication. A sample copy of any written or recorded communication directed by a lawyer to one or more prospective clients for purposes of seeking or recommending employment shall be simultaneously forwarded by the lawyer to the Office of Disciplinary Counsel.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

(e) A lawyer shall not solicit professional employment from a prospective client on the lawyer's behalf or on behalf of anyone associated with the lawyer if:

(1) the communication concerns an action for personal injury or wrongful death involving the person to whom the communication is addressed or a relative of that person, unless the personal injury or wrongful death occurred more than thirty (30) days prior to the sending of the communication; or

(2) the lawyer knows or should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(f) Written communications to prospective clients for the purpose of soliciting professional employment are subject to the following requirements:

(1) written communications to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery, and not by facsimile or e-mail

(2) if a contract for representation is sent with the written communication, the top of each page of the contract shall be marked "SAMPLE" in red ink in a type size one size larger than the largest used in the contract and the words "DO NOT SIGN" shall appear on the client signature line;

(3) written communications shall not resemble legal pleadings or other legal documents;

(4) any written communication prompted by a specific occurrence shall disclose how the lawyer obtained the information prompting the communication; and

(5) any written communication shall not reveal the nature of the prospective client's legal problem on the outside of the mailing.

COMMENT:

[1] There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.

[8] Paragraph (d) of this rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (d) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2, 7.3(b), and 7.3(e). See 8.4(a).

Hawai'i Code Comparison

With regard to paragraph (a), DR 2-103(A) provided that a lawyer "shall not seek or recommend, by telephone or other form of in person contact, employment as a private practitioner . . . from a non-lawyer who has not sought his or her advice regarding employment of a lawyer, nor shall a lawyer assist another person in so doing."

With regard to paragraph (b), DR 2-104(A) provided that "[a] lawyer who has given unsolicited advice to a layperson that [the layperson] should obtain legal counsel or take legal action shall not accept employment resulting from that advice if " (1) the advice contains "a statement or claim that is false, fraudulent, misleading, or deceptive . . .," or (2) the advice involves the lawyer's use of "coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct."

With regard to paragraph (c), DR 2-103(B) provided as follows:

> *Every written communication from a lawyer seeking professional employment from a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer shall be subject to the requirements of DR 2-101 and DR 2-102, and shall include the words "Advertising Material" on the outside envelope and at the top of the first page of the contents of the envelope. A sample copy of any written communication sent by a lawyer to one or more prospective clients for purposes of seeking or recommending employment shall be simultaneously forwarded by the lawyer to the Office of Disciplinary Counsel.*

With regard to paragraph (d), DR 2-103(A) provided that "[t]his Disciplinary Rule does not prohibit a lawyer . . . from requesting referrals from a lawyer referral service operated, sponsored, or approved by a bar association or from cooperating with any other qualified legal assistance organization."

(*Amended September 8, 1999, effective January 1, 2000; further amended December 5, 2001, effective January 1, 2002.*)

Rule 7.4. COMMUNICATION OF FIELDS OF PRACTICE AND CERTIFICATION.

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law, except as follows:

(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(b) a lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation; and

(c) a lawyer may communicate the fact that the lawyer is certified as a specialist in a field of law by a named organization, provided that the communication (i) is not false or misleading within the meaning of Rule 7.1, (ii) clearly states the name of the certifying organization, and (iii) is accompanied by a statement that "The Supreme Court of Hawaiʻi grants Hawaiʻi certification only to lawyers in good standing who have successfully completed a specialty program accredited by the American Bar Association."

COMMENT:

[1] This rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters in a specified field or fields, the lawyer is permitted to so indicate. Language indicating that a lawyer "concentrates in," "practices primarily in," "emphasizes," or "limits practice to" certain law areas is permitted. In addition, a lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] However, a lawyer may not communicate that the lawyer is recognized or certified as a specialist in a particular

field of law, except as provided by this rule. Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office, as reflected in paragraph (a). Paragraph (b) recognizes that designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] The rule requires, inter alia, that a lawyer clearly state the name of the certifying organization and that the Supreme Court of Hawaiʻi certifies only those who have completed ABA accredited certification procedures. Otherwise, the consumer may be misled as to the significance of the lawyer's status as a certified specialist. Since lawyer advertising through public media and written or recorded communications invites the greatest danger of misleading consumers, the limitations of the certification process must be clearly stated in advertising that communicates the certification.

Hawaiʻi Code Comparison

DR 2-105(A)(1) provided that a lawyer "shall not hold himself [or herself] out publicly as, or imply that [the lawyer] is, a recognized or certified specialist, except" that (i) a lawyer "admitted to practice before the United States Patent and Trademark Office may use the designation 'Patents,' 'Patent Attorney,' 'Patent Lawyer,' or any combination of those terms," (ii) a lawyer "engaged in the trademark practice may use the designation 'Trademarks,' 'Trademark Attorney,' or 'Trademark Lawyer,' or any combination of those terms," and (iii) a lawyer "engaged in the admiralty practice may use the designation 'Admiralty,' 'Proctor in Admiralty,' or 'Admiralty Lawyer,' or any combination of those terms," on their letterhead and office signs.

DR 2-105(A)(2) provided that a lawyer "may communicate that the lawyer is certified as a specialist in a field of practice when that communication does not include a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(C), and provided that each such communication is accompanied by a disclaimer which states: 'The State of Hawaiʻi does not review or approve certifying organizations.' "

DR 2-105(B) provided that a "statement, announcement, or holding out as limiting practice to a particular area or field of law does not constitute a violation of DR 2-105(A) if the statement, announcement, or holding out complies with the designations and definitions authorized by the Disciplinary Board . . . and does not include a statement or claim that is false, fraudulent, misleading, or deceptive . . . . "

EC 2-14 stated that a lawyer "should not be permitted to hold himself [or herself] out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law, where a holding out as a specialist historically has been permitted," but that a lawyer may indicate, "if it is factual, a limitation of [the lawyer's] practice or that [the lawyer] practices in one or more particular areas or fields of law . . . which will assist laypersons in selecting counsel. . . ."

(*Amended effective July 1, 1999.*)

Rule 7.5. FIRM NAMES AND LETTERHEADS.

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm may use as, or continue to include in, its name the name or names of one or more deceased or retired partners of the firm in a continuing line of succession; provided that where none of the names comprising a firm name is the name of a current partner who is on the list of active attorneys maintained by the Hawaiʻi State Bar, there shall be at least one supervisor, manager, partner, or shareholder of the firm who is on the list of active attorneys maintained by the bar.

(c) The name of a professional law corporation or limited liability law company, limited liability law partnership or other such lawful organization shall include the words "A Law Corporation," "A Limited Liability Law Company," "A Limited Liability Law Partnership," or other appropriate designation, whenever applicable.

(d) A lawyer who assumes a judicial or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of or public communications by the firm during any significant period in which the lawyer is not actively and regularly practicing law as a partner of the firm, and during such period other partners and associates of the firm shall not use the lawyer's name in the firm name or in professional notices of or public communications by the firm.

(e) A law firm shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the partners, associates, and "of counsel" lawyers of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those partners, associates, and "of counsel" lawyers of the firm not licensed to practice in all listed jurisdictions.

(f) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENT:

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

[2] Where none of the names in a firm name reflects the name of an actively-registered Hawaiʻi attorney, the firm must have at least one actively-registered Hawaiʻi attorney as a supervisor, manager, partner, or shareholder. This will assure proper supervision of and accountability for legal services furnished by the firm in Hawaiʻi.

[3] With regard to paragraph (f), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

Hawaiʻi Code Comparison

With regard to paragraphs (a) and (b), DR 2-102(B) provided that "a lawyer shall not practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B), or is contrary to law." DR 2-102(B)(1) provided that "[a] law firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession; provided that where none of the names comprising a partnership name is the name of a current partner who is on the list of active attorneys maintained by the supreme court clerk, the firm's letterhead and advertisements shall contain a statement or notation: (1) indicating that the partnership name does not include the name of any current partner who is on the list of active attorneys maintained by the supreme court clerk; and (2) designating a current partner, who is on the list of active attorneys maintained by the supreme court clerk, as being responsible for maintaining the supreme court clerk's office a public listing of the firm's partners. Any partner so designated shall be responsible for filing a revised listing of partners in the clerk's office within one month of any change in the composition of the partnership."

Paragraphs (c) and (d) are identical to DR 2-102(B)(2) and (3).

Paragraph (e) is identical to DR 2-102(D).

Paragraph (f) is substantially identical to DR 2-102(C).

(*Amended March 8, 1995, effective March 23, 1995; amended effective March 28, 1995; further amended June 17, 1999, effective July 1, 1999.*)

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. BAR ADMISSION AND DISCIPLINARY MATTERS.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT:

[1] The duty imposed by this rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of the Hawaiʻi constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a

justification for failure to comply with this rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

Hawai'i Code Comparison

DR 1-101(A) provided that a lawyer is "subject to discipline if [the lawyer] has made a materially false statement in, or if [the lawyer] has deliberately failed to disclose a material fact requested in connection with, [the lawyer's] application for admission to the bar." DR 1-101(B) provided that a lawyer "shall not further the application for admission to the bar of another person known by [the lawyer] to be unqualified in respect to the character, education, or other relevant attribute." With respect to paragraph (b), DR 1-102(A)(5) provided that a lawyer shall not engage in "conduct that is prejudicial to the administration of justice."

Rule 8.2. JUDICIAL OFFICIALS.

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.

COMMENT:

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Hawai'i Code Comparison

With regard to paragraph (a), DR 8-102(A) provided that a lawyer "shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office." DR 8-102(B) provided that a lawyer "shall not knowingly make false accusations against a judge or other adjudicatory officer."

(*Amended effective November 18, 1994.*)

Rule 8.3. REPORTING PROFESSIONAL MISCONDUCT.

(a) A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) A lawyer shall not:

(1) negotiate, attempt to settle, or settle any legal matter by threatening to file or refrain from filing a disciplinary complaint against any lawyer.

(2) offer, agree to, attempt, negotiate, enter into, or acquiesce in the formation of any agreement limiting the ability of the lawyer or any other person to:

(i) file a disciplinary complaint against any lawyer; or

(ii) cooperate with a disciplinary proceeding or investigation.

COMMENT:

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[5] Subsection (d) was added to make clear that attorneys' duties to clients and the profession are requirements that cannot be negotiated or given away or used to bludgeon opponents into acquiescence. Subsection (d) does not impose additional duties to report information acquired while confidentiality counseling, mentoring, or advising another attorney.

Hawai'i Code Comparison

DR 1-103(A) provided that "[a] lawyer possessing unprivileged knowledge of a violation of [a Disciplinary Rule] shall report such knowledge to . . . authority empowered to investigate or act upon such violation."

(*Amended effective June 24, 1999, effective July 1, 1999.*)

Rule 8.4. MISCONDUCT.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) fail to cooperate during the course of an ethics investigation or disciplinary proceedings.

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT:

[1] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable

offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty or breach of trust are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to the challenges of legal regulation of the practice of law.

[3] An attorney who is the subject of an ethics investigation or disciplinary proceeding has an ethical duty to timely cooperate with that investigation or proceeding. Examples of failure to cooperate are described in Hawai'i Supreme Court Rule 2.12A(a).

[4] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Hawai'i Code Comparison

With regard to paragraphs (a) through (c), DR 1-102(A) provided that a lawyer shall not:

> *"(1) Violate a Disciplinary Rule.*
>
> *"(2) Circumvent a Disciplinary Rule through actions of another.*
>
> *"(3) Engage in illegal conduct involving moral turpitude.*
>
> *"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.*
>
> *"(5) Engage in conduct that is prejudicial to the administration of justice.*
>
> *"(6) Engage in any other conduct that adversely reflects on his fitness to practice law."*

There was no counterpart to paragraph (d) in the Hawai'i Code.

Paragraph (e) is substantially similar to DR 9-101(C).

There was no direct counterpart to paragraph (f) in the Disciplinary Rules of the Hawai'i Code. EC 7-34 stated in part that "[a] lawyer . . . is never justified in making a gift or a loan to a [judicial officer] except as permitted by . . . the Code of Judicial Conduct." EC 9-1 stated that a lawyer "should promote public confidence in our [legal] system and in the legal profession."

Rule 8.5. JURISDICTION.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

COMMENT:

[1] In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

[2] If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

[3] Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with

respect to practice before a federal tribunal, where the general authority of the states authority as federal tribunals may have to regulate practice before them.

[4] This rule also applies to lawyers practicing in this jurisdiction on a pro hac vice basis.

Hawaiʻi Code Comparison

There was no counterpart to this rule in the Hawaiʻi Code.

ADDENDUM A -- Deleted.

MAINTENANCE OF BOOKS
AND RECORDS

(*Deleted December 2, 1994, effective February 15, 1995.*)